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FILED

JUN 16 1960

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 221

PHILCO CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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June 17, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Philco Corporation moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on October 12, 1959, 361 U.S. 825. Rehearing is sought at this time because, as the annexed petition more fully points out, the United States Court of Claims recently held for plaintiff in *General Motors Corp., Frigidaire Div.* v. *United States*, No. 236-56,

May 4, 1960, on a basis which cannot be reconciled with that same court's summary dismissal of this case.

Although this petition for rehearing is lodged after the expiration of time prescribed in Rule 58 of the rules of this Court, the ground upon which it is based arose after such time, and the Court has power, in its discretion, to entertain the petition. *United States* v. *Ohio Power Co.*, 353 U.S. 98; *Clark* v. *Manufacturers Trust Co.*, 337 U.S. 953.

The annexed petition prays only that this Court summarily vacate the order of the Court of Claims in the instant case in order to provide the Court of Claims with an opportunity to reconsider its decision in the instant case in light of its recent and conflicting decision in the *General Motors* case, *supra*. The question presented is of such vital significance to the proper administration of the excise tax laws that it is appropriate for this Court to exercise its discretion to permit the Court of Claims to resolve and clarify the existing doubt and confusion.

Respectfully submitted,

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Philco Corporation, prays this Court to grant rehearing of its order of October 12, 1959, denying a writ of certiorari, 361 U.S. 825; to grant the writ of certiorari; to vacate the judgment of the United States Court of Claims; and to remand the case for further consideration in light of that court's recent decision in *General Motors Corp., Frigidaire Div.* v. *United States*, Nos. 236-56, May 4, 1960. (Hereinafter sometimes referred to as "*May 4, General Motors.*")

(A copy of the opinion of the Court of Claims is appended hereto.)

REASONS FOR GRANTING REHEARING, ISSUING THE WRIT, AND REMANDING THE CASE

1. Since this Court denied certiorari in this case, the United States Court of Claims has reversed its position with respect to the question presented, and, without referring to the instant case,[1] has announced a principle which cannot be reconciled with it.[2] On May 4, 1960, in *General Motors Corp., Frigidaire Div.* v. *United States*, No. 236-56,[3] the Court of Claims decided[4] that a rebate of money constituted a price readjustment entitling petitioner to an excise tax refund under Section 3443(a)(2) of the Internal Revenue Code of 1939 (now Section 6416(b)(1) of the INTERNAL REVENUE CODE OF 1954) *regardless of the reason or purpose for the rebate.* Speaking of a price rebate given to reim-

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[1] In the instant case, the Court of Claims summarily granted the Government's motion for judgment on the pleadings, relying on its prior decisions in General Motors Corp., Frigidaire Div. v. United States, 147 F. Supp. 739, 163 F. Supp. 854, *cert. denied*, 358 U.S. 866, and Ford Motor Co. v. United States, 156 F. Supp. 554, *cert. denied*, 358 U.S. 864. The opinion of the Court of Claims in the May 4 General Motors case made no reference to these or any previous price readjustment cases despite their citation in the dissent.

[2] Petitioner's opposition to the motion for judgment on the pleadings in the instant case briefed the Court of Claims on the legislative history of the controlling statute which, in our opinion, demonstrates that the principle now adopted by the Court of Claims properly reflects the intent of the Congress. See Petition for Certiorari in the instant case, App. B.

[3] The Government's motion for a rehearing of this case is currently pending before the Court of Claims.

[4] By a 3-2 vote, retired Judge Littleton voting with the majority.

burse a vendee for the cost of local advertising, the Court of Claims said:

> "[T]he price was later 'readjusted' by way of a rebate to the purchaser. Section 3443 does not say that is applicable only to some kinds of rebates, or only to rebates given for some kinds of reasons or purposes. . . .
>
> * * * * * *
>
> "[T]he only requirement of [Section 3443] is that some of the money which the purchaser had paid for the property should be later refunded to the purchaser." [App., pp. 3a, 5a].

This statement, which we believe correctly reflects the unambiguous intent of the Congress,[5] cannot be reconciled with the action of the Court of Claims in the instant case.[6] Here, the Court of Claims dismissed without evidentiary hearing Philco's petition alleging that petitioner had made a rebate of money to its vendee because a purchased article had proved defective. The only possible distinction between the instant case and the *May 4 General Motors* case is the reason or purpose for giving the rebate, and in the *May 4 General Motors* case the Court of Claims belatedly recognized that this distinction is meaningless.

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[5] See n. 2 *supra*.

[6] For several years the Court of Claims has been struggling with the problem of what constitutes a price readjustment under Section 3443 of the Internal Revenue Code of 1939. This struggle, unhappily, has not been marked by the common judicial definitional process of inclusion and exclusion, but rather by a reversal and re-reversal of principle. Compare the May 4 General Motors case with the cases cited n. 1 *supra*. Compare also General Motors Corp., Frigidaire Div. v. United States, 121 F. Supp. 932, *cert. denied*, 348 U.S. 942.

The complete silence of the *May 4 General Motors* case with respect to all earlier Court of Claims price readjustment cases leaves unresolved that court's obvious inconsistency on this vitally important question affecting a large area of excise tax law. We now urge only that the Court of Claims be afforded the opportunity,[7] without indication of this Court's views on the merits, to reconsider its decision in the instant case in light of its recent decision in the *May 4 General Motors* case and, in its discretion, to reconcile or clarify the existing confusion.

2. Some clear answer to the question here presented is essential for all manufacturers who must formulate price policies for the numerous articles subject to excise taxes. As of this date there are no less than seven excise tax price readjustment cases pending in four different Federal courts, all of which could turn on the question of whether or not the reason or purpose for making a rebate has tax consequences.[8]

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[7] Absent action by this Court on this petition, the petitioner will have no remedy before the Court of Claims. Ct. Cl. Rule 54(b); Scotten v. Littlefield, 235 U.S. 407; Collins v. Wichita, 254 F. 2d 837 (10th Cir.); Berryhill v. United States, 199 F. 2d 217 (6th Cir.); Loucke v. United States, 21 F.R.D. 305 (S.D.N.Y.); 7 Moore, Federal Practice § 60.26[3] at 282.

[8] Chrysler Corp. v. United States, Civil No. 19,418, E.D. Mich., complaint filed Sept. 18, 1959; Philco Corp. v. United States, Civil No. 28,000, E.D. Pa., complaint filed Apr. 29, 1960; U. S. Associates, Inc. v. United States, Civil No. 1277-59 HW, S.D. Calif., complaint filed Dec. 10, 1959; Ben-Hur Mfr. Co. v. United States, No. 464-56, Ct. Cl., petition filed Oct. 30, 1956; Columbia Broadcasting System v. United States, No. 423-57, Ct. Cl., petition filed Aug. 30, 1957; Ford Motor Co. v. United States, No. 415-56, Ct. Cl., petition filed Sept. 28, 1956; Kaiser Industries, Inc. v. United States, No. 536-56, Ct. Cl., petition filed Dec. 27, 1956. Cf. Waste King Corp. v. United States, Fed. Excise Tax Rep. (60-1 USTC) ¶ 15,271 (Nov. 25, 1959).

In a petition for certiorari,[9] the Government indicated the importance of the question here presented and estimated that its resolution would affect taxes amounting to roughly 27 million dollars per year. Perhaps even more significant than the total amount involved is the fact that the excise tax, being measured by price, is a tax upon gross revenues, a tax which exceeds the profit margin on some articles. If doubt and confusion unnecessarily continue to becloud tax consequences of rebates, manufacturers will be forced to resolve the doubt by charging higher prices or else by making themselves vulnerable to a loss on each sale involved.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue, the judgment of the United States Court of Claims be vacated, and the case be remanded for further consideration in light of the Court of Claims decision in *General Motors Corp., Frigidaire Div.* v. *United States*, No. 236-56, May 4, 1960.

Respectfully submitted,

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[9] United States v. General Motors Corp., Frigidaire Div., *cert. denied*, 348 U.S. 942.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

HENRY B. WEAVER, JR.